Supreme Court, U.S.
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No. 97-1098

In The

Supreme Court of the United States

October Term, 1997

MICHAEL R. DANCY,

Petitioner,

vs.

HYSTER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION ON BEHALF OF RESPONDENT HYSTER COMPANY

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RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Should the analysis for determining whether expert testimony should be admitted under Rule 702 of the Federal Rules of Evidence mandated by this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992), be restricted to scientific testimony?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6 Respondent states that its correct corporate name is NACCO Materials Handling Group, Inc., successor in interest by merger to Hyster Company d/b/a Hyster Company. The parent company of NACCO Materials Handling Group, Inc. is Hyster-Yale Materials Handling, Inc. In addition, Cascade Corporation and Liberty Mutual Insurance Company were previously parties to this proceeding.

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STATEMENT OF THE CASE

Petitioner Michael R. Dancy seeks issuance of a writ of certiorari following the affirmance of an adverse grant of summary judgment in his product liability suit against Respondent Hyster Company, a manufacturer of lift trucks. This Court is asked to consider whether its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992), should be restricted to what Petitioner refers to as "scientific testimony." Respondent requests that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 127 F.3d 649 (1997). *See also* Petition Appendix A.

Respondent respectfully suggests that misstatements of fact in the petition bear on the issues that would properly be before the Court if certiorari were granted.[1] Therefore, pursuant to the requirements of Supreme Court Rule 15.2, Respondent submits the following statement of the case.[2]

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[1] Petitioner asserts that Respondent "had notice of the machines' propensity to tip over due to the nature of their use and prior tipover occurrences" (Petition at 3.), and "had been previously put on notice that similar accidents have occurred where the lift truck had tipped over laterally causing injury to the operator." (Petition at 3.) These unsupported assertions were expressly considered and rejected by the district court (Petition Appendix B at 36) and by the Court of Appeals for the Eighth Circuit. *Dancy v. Hyster*, 127 F.3d at 654. *See also* Petition Appendix A at 14-15.

[2] Respondent also incorporates by reference any additional background facts in the opinion below. *Dancy v. Hyster Company*, 127 F.3d 649, 649-52 (8th Cir. 1997). *See also* Petition Appendix A, at 2-3.

Respondent designs and manufactures lift trucks.[3] In March of 1988, Respondent manufactured a lift truck, which complied with all trade standards, safety standards, federal or state statutes or regulations, and delivered the lift truck to the Chase Bag Company in Monticello, Arkansas. Written safety warnings and operating instructions were provided in the Operating Manual that accompanied the lift truck. The lift truck was also equipped with warning labels that were attached to the lift truck when it was shipped. Chase Bag Company was later acquired by the Union Camp Corporation ("Union Camp"). The lift truck was used by Union Camp employees to clamp, lift and move heavy rolls of paper.

Petitioner began working for Union Camp in the spring of 1994, and eventually received training to operate the lift truck. Petitioner had been working for Union Camp for approximately four months at the time of his accident.

At approximately nine o'clock on the morning of July 7, 1994, a mechanic performed a preventive maintenance check on the lift truck. The check revealed no evidence of any problems or defects. Later that morning, the same mechanic witnessed Petitioner operating the lift truck in an unsafe manner. Specifically, Petitioner was grasping one roll of paper with the hydraulic grappler with a second roll perched on top of the first roll. Petitioner had overloaded the lift truck and was affecting its stability by carrying two paper rolls and by carrying the rolls while

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[3] The vehicle has also been referred to by the parties as a forklift.

the mast and attachments of the lift truck were fully extended to their maximum height. The load was swaying and the mechanic informed Petitioner that what Petitioner was doing was dangerous.

At approximately eleven o'clock on the morning of July 7, 1994, Petitioner was again using the lift truck to lift two rolls of paper when the lift truck overturned. According to Petitioner the accident occurred when:

> [A]s I was sitting still on the clamp truck with my seatbelt intact, I began to raise a load of paper to stack them, and that's when the rear end came off the ground, and it tilted forward. And as soon as it started to tilt forward, that's when it fell to the right, and I immediately grabbed the steering wheel and held on and just had my legs down, pressed down on them as hard as I could and – from the fall. My legs went flying out.

When the lift truck tipped over onto its right side, Petitioner's right foot was pinned between the front right leg of the overhead guard of the lift truck and the concrete floor. Petitioner's right foot, and the part of his right leg just below his knee, were subsequently amputated as a result of the injuries he received in the accident.[4]

Petitioner commenced suit in state court against Hyster Company and Cascade Corporation, the manufacturer

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[4] The parties disagreed as to whether the weight of the two rolls of paper being lifted at the time of his accident exceeded the specified lifting capacity of the lift truck. The lower courts did not resolve this factual dispute because its resolution did not affect the outcome of this lawsuit under the governing substantive law. *Dancy*, 127 F.3d at 650 n.2. *See also* Petition Appendix A at 2-3.

of the clamp. The case was removed to United States District Court for the Eastern District of Arkansas on diversity grounds.[5]

Petitioner retained Dr. Richard E. Forbes to serve as his expert in this matter in February of 1996. Dr. Forbes is a mechanical engineer on staff in the Mechanical Engineering Department at Mississippi State University. Dr. Forbes' specialty is in the area of thermal sciences, particularly heat transfer and fluid mechanics. Dr. Forbes has never designed a forklift or any of its components, has not been involved in the manufacturing of forklifts, and has not published anything relating to forklifts. There is no aspect of Dr. Forbes' experience, other than his general mechanical engineering background, which he contends has anything to do with forklifts.

Dr. Forbes' deposition was taken on August 26, 1996. During that deposition Dr. Forbes testified that the lift truck was defectively designed because of the absence of a guard or similar protective device on the lower right side of the lift truck. As of that date, Dr. Forbes had not designed a guard of the type he contended should have been present on the lift truck, and had not conducted tests or studies to determine whether or not the proposed guard was feasible or would be effective. Dr. Forbes also agreed that he had never seen a device such as the one he was proposing or one similar to it on a forklift.

Sometime after his deposition Dr. Forbes produced a "supplemental report" consisting of two written pages

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[5] Cascade Corporation was voluntarily dismissed as a defendant in October of 1996.

and four attached photographs. In this report, Dr. Forbes expressed the opinion that "a permanently-located open-mesh guard on the right side of the lift truck would have prevented Dancy's injury." The language of the supplemental report confirmed that Dr. Forbes had still not actually designed, built or tested a guard of the type to which he was referring. (*Dancy*, 127 F.3d at 652; Petition Appendix A at 6.) No other evidence regarding Dr. Forbes' opinion was ever submitted.

After extensive discovery, Respondent filed a Motion in Limine in which it asked the district court to prevent Dr. Forbes from testifying as an expert witness. Respondent maintained that Dr. Forbes was "not qualified by education or experience or training" to testify about some non-specified type of guard on the lift truck. After the discovery cut-off Respondent also filed a Motion for Summary Judgment. The parties fully briefed the issues presented in the two motions, filed competing statements of fact, and submitted numerous exhibits, including affidavits, photographs and all or portions of five deposition transcripts.

The district court granted Respondent's Motion in Limine and barred Dr. Forbes from testifying as an expert. The district court found that the assessment of Dr. Forbes' testimony was governed by the analysis promulgated by this Court in *Daubert*, and that Dr. Forbes' testimony did not satisfy that standard. (Petition Appendix B at 24-26.)

In reaching its decision the district court first addressed and disposed of the question of whether a lift truck is comparable or similar to a front-end loader or

bobcat. It was Petitioner's contention that because front-end loaders and bobcats had guards, and those vehicles were "comparable" to a lift truck, the Respondent's lift truck should have had a guard.[6] Respondent presented contrasting evidence of the differences in these types of machinery within the classification of machinery by the Society of Automotive Engineers (SAE).[7] In addition, Respondent also submitted an expert's affidavit which explained that the justification for the differing classifications flows from a recognition that lift trucks are designed for a different purpose and working environment than are front-end loaders or bobcats. Safety features that are necessary on a front-end loader may not be necessary or practical for a lift truck. The affidavit also stated that no lift truck manufacturer has presently incorporated guards similar to those of front-end loaders and bobcats in the design of industrial lift trucks intended for use within a manufacturing facility.[8]

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[6] This allegation was made in Petitioner's Brief in Support of Response to Motion in Limine and in his Brief in Support of Response to Motion for Summary Judgment. A comparison between lift trucks and bobcats or front-end loaders was *not* made by Dr. Forbes at his deposition or in his written response and was likewise not referenced in the Statement of Facts filed by Petitioner in response to Respondent's Motion for Summary Judgment.

[7] The SAE classifies lift trucks under a category entitled "Powered Industrial Trucks" while front-end loaders and bobcats are classified as "Earthmoving" or "General Purpose Industrial" machinery.

[8] The affidavit was not challenged or mentioned by Petitioner in his subsequent pleadings. Response in Opposition to Defendant's Motion for Summary Judgment, Statement of Facts, and Brief in Support of Plaintiff's Response to

After rejecting the notion that lift trucks are comparable to front-end loaders or bobcats, the district court applied *Daubert* to the remaining portions of Dr. Forbes' opinion. The district court considered the four *Daubert* factors and found that Forbes' theory could be, but had not been tested. Consequently, since he had not even attempted to build the proposed guard, Forbes' theory had not been subjected to peer review and publication, the known or potential rate of error could not be determined because Forbes' theory had never been tested, and the district court could not determine whether the theory had been "generally accepted." (Petition Appendix B at 26-27.)

After granting Respondent's Motion in Limine, the district court determined that Petitioner could not make a submissible case for the jury without Dr. Forbes' testimony and granted summary judgment in favor of Respondent.

Petitioner appealed the district court's rulings in favor of Respondent to the Court of Appeals for the Eighth Circuit. Petitioner argued that the district court had erred in applying the *Daubert* factors, which he contended only apply to "expert testimony [that] will rely on scientific principles or methods." *Dancy*, 127 F.3d at 652. *See also* Petition Appendix A at 7.

The Court of Appeals for the Eighth Circuit found Petitioner's argument unpersuasive, citing an earlier decision in which it had expressly rejected an identical

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Defendant's Motion for Summary Judgment, all of which were filed with the district cout on November 15, 1996.

argument. *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996). Consequently, the Eighth Circuit held that the district court was correct in analyzing Dr. Forbes' testimony under the factors for reliability identified in *Daubert*. Based on these factors, the Court of Appeals for the Eighth Circuit concluded that the "district court was justified in questioning the reliability and usefulness of Dr. Forbes's testimony. Disallowing his testimony was not an abuse of discretion." *Dancy*, 127 F.3d at 652. *See also* Petition Appendix A at 7. The court then reviewed de novo the district court's grant of summary judgment, and concluded that without the aid of expert testimony Petitioner could not demonstrate the existence of a defect in the lift truck. Therefore, the entry of summary judgment was affirmed. *Dancy*, 127 F.3d at 652-55. *See also* Petition Appendix A at 8-15.

REASON FOR DENYING THE WRIT

Respondent submits the following arguments in support of its request for the denial of the petition for writ of certiorari. First, the excluded expert testimony was so lacking in reliability that exclusion would have been warranted under any interpretation of Rule 702 of the Federal Rules of Evidence. Therefore, the decision below is correct without regard to the question sought to be raised by the Petitioner. Second, the Court of Appeals was correct in affirming the district court's application of the analysis described in *Daubert* for determining the admissibility of expert testimony. Accordingly, since the expert testimony in this matter clearly fails to satisfy any of the factors identified in or relevant under *Daubert*, the district court

and the Court of Appeals for the Eighth Circuit correctly determined that the testimony was inadmissible.

A. Even if the analysis in Daubert were inapplicable to Dr. Forbes' testimony, his testimony would still be inadmissible because it fails to meet the basic requirement of reliability mandated by Rule 702.

Even if this Court were to hold that the analysis and factors outlined in *Daubert* did not apply to Dr. Forbes' testimony, his testimony would still fail to meet the remaining requirements for admissibility under Rule 702. As this Court stated in *Daubert*, the "overreaching subject" of Rule 702 focuses on "the evidentiary relevance and reliability" of proposed expert testimony. *Daubert*, 509 U.S. at 595. Even if the factors outlined by this Court in *Daubert* are not applied to a particular expert, at the very least, Rule 702 still requires a preliminary assessment that some standard of reliability has been met before that expert's testimony can be admitted.

The facts of this case clearly show that Dr. Forbes' proposed testimony does not rise to any imaginable standard of reliability. This point is illustrated by an examination of the four cases cited by Petitioner in support of his assertion that Dr. Forbes' testimony should be admissible under a different interpretation of Rule 702. (Petition at 6.)

Petitioner cites *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994); and *Freeman v. Case Corp.*, 924 F. Supp.

1466 (W.D. Va. 1996)[9] in support of his argument that *Daubert* should be limited solely to "scientific evidence." (Petition at 6.) However, the analysis employed in these cases, even if persuasive to this Court, would not require the reversal of the judgment here.

As a threshold matter, the Petitioner's reliance upon *Rincon* and *Benedi* is misplaced. (Petition at 6-7.) The Ninth Circuit's decision in *Rincon* did not turn on a distinction between "scientific" and "technical" evidence. The only reference in *Rincon* even tangentially related to this issue was in a footnote in which the Ninth Circuit merely referenced this Court's acknowledgement in *Daubert* that the evidence before it was "scientific" evidence rather than technical evidence or other areas of specialized knowledge which are also covered by Rule 702. *Rincon*, 28 F.3d at 923, n.3. Similarly, the *Benedi* case does not even address the issue underlying Petitioner's argument herein. The Fourth Circuit in *Benedi* did frame its *Daubert* analysis in terms of "scientific knowledge." *Benedi*, 66 F.3d at 1383. However, neither that court's substantive discussion nor its decision hinged upon any alleged distinction under Rule 702 in the admissibility requirements for scientific versus technical evidence.

Respondent agrees that the Tenth Circuit in *Compton* and the Fourth Circuit in *Freeman* decided not to apply the factors laid out by this Court in *Daubert* to expert testimony which those courts characterized as "based

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[9] Petitioner has cited the district court case. However, this case has recently been affirmed by the Court of Appeals for the Fourth Circuit in *Freeman v. Case Corporation*, 118 F.3d 1011 (4th Cir. 1997).

solely upon experience or training" as opposed to being based on "any particular methodology or technique." *Compton*, 82 F.3d at 1519. However, neither of those cases stand for the proposition that "nonscientific" evidence is *per se* admissible or otherwise not subject to Rule 702 analysis. Therefore, the resolution of the conflict asserted by Petitioner is irrelevant and unnecessary to the ultimate resolution of this case.

For example, in *Compton* the court acknowledged that even in the absence of the *Daubert* factors, the offered expert testimony must still be "both relevant and reliable." *Compton*, 82 F.3d at 1519. A review of the facts of *Compton* make it understandable how that court could have reached its determination that the expert testimony involved in that case was "both relevant and reliable." In *Compton*, the court was reviewing the proposed testimony of an aerospace and mechanical engineer regarding alleged defects in the design of an automobile roof. *Id.* at 1513-19.[10] Based on his extensive research and personal

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[10] The opinion reveals the following facts weighing in favor of the reliability of the expert's testimony: (1) the expert had personally inspected the accident vehicle; (2) the expert had personally inspected an identical undamaged vehicle; (3) the expert reviewed proposed manufacturer standards pertaining to headroom after roof crush; (4) the expert reviewed technical papers containing information about an experimental safety vehicle; (5) the expert reviewed proposed federal standards regarding headroom after roof crush; (6) the expert reviewed a paper presented by the Society of American Automotive Engineers discussing the advantages of roof crush as an energy-absorbing device for seat-belted occupants; and (7) the expert reviewed an SAE paper entitled "Field Studies of Rollover Performance." *Id.*

inspections, the expert then offered detailed and specific testimony regarding his opinion that the roof of the automobile was designed defectively. Specifically, he testified that

> [H]e would design the vehicle to allow only 2 to 3 inches of roof crush. He also explained crush should be limited to ensure 33 inches of remaining headroom after an accident occurring at a speed of 50 m.p.h. Under this standard the roof of the vehicle would be required to sustain average forces of between 48,000 and 71,000 pounds.

Id. at 1516.

Similarly, the testimony admitted in the *Freeman* case could also arguably meet the "relevant and reliable" standard required for admissibility under Rule 702 even in the absence of a more formal application of the *Daubert* factors. The district court's opinion in *Freeman* recites the following description of the basis for the expert's testimony in that case:

> [I]n preparation for his testimony, he reviewed extensive trade literature and notes pertaining to the design of the Case 1130 and of other tractors of varying sizes and configurations, the design of tractors generally, trade journals, accident statistics, industry and military specifications, and other assorted materials . . . Reed inspected the tractor that injured Freeman, and performed "tests" on it by manipulating various controls, operating the tractor while attempting to recreate the sudden forward movement described by Freeman, and placing his foot on the brake and SRC pedals to test his theory that both could be engaged simultaneously.

Freeman v. Case Corp., 924 F. Supp. 1456, 1462-63 (W.D. Va. 1996).

Compared to that found in *Compton* and *Freeman*, the foundation of Dr. Forbes' testimony in the present matter is quite unreliable. While Dr. Forbes is a mechanical engineer, his specialty is in the area of thermal sciences. Moreover, Dr. Forbes admitted that he had never designed a forklift or any of its components. Although Dr. Forbes did inspect the lift truck involved in the accident, he readily admits that he has never seen a lift truck installed with a "guard" similar to the one he proposes. In addition, while Dr. Forbes did review OSHA and ANSI standards generally applicable to lift trucks, as well as the owner's manual for this lift truck and reports containing general statistics regarding lift truck accidents, none of these documents contained any information or discussion regarding the need, feasibility, design or possible effectiveness of the theoretical "guard" which is at the center of Dr. Forbes' testimony.

Finally, Dr. Forbes' opinion certainly fails to rise to the level of specificity necessary to afford it any measure of evidentiary reliability. Not only has Dr. Forbes never designed or seen a guard of the type he proposes should have been installed on this lift truck, but he also failed to come forth with any specific information regarding the proper location, dimensions and materials for his proposed guard. Accordingly, Respondent submits that Dr. Forbes' testimony is not sufficiently reliable to allow admission under Rule 702 even under a more relaxed approach to expert testimony than has been followed in the Eighth Circuit. Certainly, given the questionable reliability of Dr. Forbes' testimony, the district court

clearly did not abuse its discretion in excluding this evidence. *General Electric v. Joiner,* (No. 96-188) ___ U.S. ___ (1997).

B. The district court's analysis of the proffered expert testimony as affirmed by the Eighth Circuit is completely consistent with Daubert.

This Court's decision in *Daubert* marked a significant shift in the analysis of expert testimony under Rule 702 of the Federal Rules of Evidence. The Court recognized an abandonment of the "general acceptance" test of *Frye v. U.S.,* 293 F. 1013 (D.C. Cir. 1923), and replaced it with an examination into the underpinnings of the expert's testimony to determine if there is sufficient indicia of validity and reliability.[11]

In *Daubert* this Court explained the proper analysis for determining the admissibility of expert testimony under Rule 702. The Court stated that as the gatekeeper of expert testimony, the trial judge "must ensure that any and all scientific testimony or evidence as admitted is not only relevant but reliable." *Daubert,* 509 U.S. at 589.

Petitioner places extreme emphasis upon this Court's use of the word "scientific" throughout its opinion and attempts to deduce therefrom that Dr. Forbes' testimony,

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[11] *See* 11 *Moore's Federal Practice* § 702.10 (Cum. Supp. 1995-96); Christopher B. Mueller and Laird C. Kilpatrick, *Evidence* § 7.8; G. Michael Fenner, *The Daubert Handbook: The Case, its Essential Dilemma, and its Progeny,* 29 Creighton L. Rev. 939, 966, (1996); Bert Black, *Winning the Expert Wars in the Age of Daubert,* SB16 ALI-ABA 13 (1996).

which it characterizes as "technical" in nature, is exempt from *Daubert*'s requirements. Such a narrow reading of *Daubert* ignores the further guidance provided by this Court in that decision.

The Court described "scientific methodology," which by definition is the foundation for "scientific" testimony, as "based on generating hypotheses and testing them to see if they can be falsified . . . " *Id.* at 593. Dr. Forbes' testimony comes within this definition. In fact, his entire testimony was premised upon his hypothesis that the installation of a guard on the lift truck could have prevented Petitioner's injuries. Petitioner's attempt to label Dr. Forbes' testimony as purely "technical" is at odds with the language in *Daubert*. Therefore, even if there is a legitimate question as to whether *Daubert* applies to purely technical evidence, it cannot be resolved in this case, and presents no support for granting the writ of certiorari here.

Moreover, this Court's analysis in *Daubert* is properly applied to Dr. Forbes' testimony even if the petitioner is accurate in his characterization of this evidence as "technical." Petitioner contends that this Court expressly limited its *Daubert* analysis to cases involving "scientific" evidence. (Petition at 7.) The Petitioner references footnote 8 of the *Daubert* opinion to support this contention. Footnote 8 provides in full:

> Rule 702 also applies to "technical or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

Contrary to Petitioner's assertion, a straightforward interpretation of this quoted footnote is that this Court was merely acknowledging the nature of the evidence before it and not placing a limitation on the applicability of its decision. In fact, this footnote simply reconfirms that Rule 702, which formed the underlying basis for this Court's analysis in *Daubert*, governs both scientific and technical evidence. Consequently, it logically follows that *Daubert* applies equally to all expert testimony covered by Rule 702 regardless of its characterization. A majority of the Courts of Appeals have so held. *See, e.g., Bogosian v. Mercedes-Benz of North America*, 104 F.3d 472 (1st Cir. 1997); *Cook v. American Steamship Company*, 53 F.3d 733 (6th Cir. 1995); *Cummins v. Lyle Industries*, 93 F.3d 362 (7th Cir. 1996); *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293 (8th Cir. 1996); *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382 (8th Cir. 1995); *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1994); and *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994).

In *Daubert* this Court identified a nonexhaustive list of factors to assist in assessing the reliability and in turn admissibility of expert evidence under Rule 702. *Daubert*, 509 U.S. at 593-95. The Court also stated that "many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593. Accordingly, the Court of Appeals for the Eighth Circuit has incorporated various other factors into its *Daubert* analysis of expert testimony in the context of design defect cases. *See Peitzmeier*, 97 F.3d at 297; and *Pestel*, 64 F.3d at 284. The following chart compares those judicially recognized factors with the theory being promoted by Dr. Forbes in this matter.

Relevant Factors	*–Forbes' Theory*
Whether the hypothesis can be (and has been) tested. (*Daubert*, 113 S.Ct. at 2796-97; *Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 384.)	Forbes' theory can be but has not been tested. (App. 233.)[12]
Whether the methodology has been subject to peer review and publication. (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 384.)	Forbes' theory has not been subject to any peer review and has not been included in any publication. (App. 233.)
Whether the methodology has been generally accepted in the community (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 298; *Pestel*, 64 F.3d at 384.)	Forbes' theory has not been accepted by *any* lift truck manufacturer. (App. 200, 233.)
Whether the expert was hired for trial purposes. (*Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 383.)	Forbes was retained in 1996 for the sole purpose of this litigation. (App. 224.) Therefore, his theory was developed exclusively for litigation purposes.

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[12] Respondent's references to "App." refer to the location of this information in the appendix produced below as the record for the Court of Appeals for the Eighth Circuit. Respondent recognizes that this Court does not have this appendix in its possession, but includes these references merely to avoid any questions regarding the accuracy of these statements.

Whether the concept has been used in its present state on the relevant machine. (*Pestel*, 64 F.3d at 384.)	Forbes' theory has never been used in its present state on a relevant model lift truck. (App. 233.)
Whether the design was finished, i.e. was the concept still "evolving". (*Pestel*, 64 F.3d at 384.)	Forbes has not even attempted to design a guard of the type he theorized about at his deposition. Therefore, the design has not been started, much less finished. (App. 233.)
What is the known or potential rate of error of the proffered theory. (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 298; *Pestel*, 64 F.3d at 384.)	Because Forbes' theory has never been tested, the known or potential rate of error cannot be determined. (App. 233.)

It is clear that Dr. Forbes' theory does not satisfy the test established by *Daubert* and applied in subsequent Eighth Circuit decisions. Dr. Forbes' hypothesis regarding the effectiveness of his undesigned and unfabricated guard fails each and every factor identified by this Court and the Eighth Circuit. Moreover, Dr. Forbes himself has tacitly admitted that he never even resolved such basic questions regarding his proposed guard such as where the guard should be located and the materials from which it should be constructed; and he has never considered the human factors issues relevant to the design of a guard.[13] Therefore, Respondent submits that the record fails to

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[13] In his supplemental report, Dr. Forbes references where the guard "would be located", "typical" material, and human factors aspects that "would have to be included." (App. 19.)

sustain any alleged misapplication of *Daubert* by the courts below. The very uniqueness of the facts of this case suggests that review by this Court is neither necessary nor warranted.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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